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Supreme Court, U.S.
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No. _____

Supreme Court of the United States

October Term 1986

Daniel Minchew, Petitioner

v.

Robert G. Fierer, Respondent

On Petition for Writ of Certiorari
to the United States Court
of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 4, 1986

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QUESTIONS PRESENTED FOR REVIEW

1. In disputes between attorneys and clients in the federal courts, whether the trial court has an obligation to enforce violations of the Code of Professional Responsibility, either by way of an instruction to the jury on the provisions of the Code, or as an independent matter of review; and the appellate courts should then make a plenary review based upon Code provisions.

2. Whether the "Ethical Considerations" recently developed under the Code of Professional Responsibility, and particularly those setting forth the duties and obligations between attorneys and clients, constitute legally enforceable standards for determining the legal relations and responsibilities of

attorneys to clients, beyond the minimal requirements of the Disciplinary Rules.

3. Whether it violates due process, or invokes supervisory powers of the federal courts, for an attorney retained to perform the service of defending the client against criminal charges, to obtain an instruction to the jury, over the client's objection, permitting the jury to use a conviction on the charges for which he was hired to defend, as a means of impeaching the credibility of the client, in deciding disputes between them.

4. Whether, as a matter of public policy, the federal courts will enforce the terms of an understanding or a contract between an attorney and client that reflects an excess charge at the time of the contract, although it may not be held to be excessive for the

service ultimately performed; or whether, if so, the courts should permit enforcement only on quantum meruit grounds and under Ethical Consideration 2-23, which prohibits such actions in the absence of a "gross imposition", "fraud", client impropriety, or an "imperative" requirement.

5. Whether the ruling at bar is in conflict with other circuits or current law as to the standards and appellate review of disputes between attorneys and clients, or in its failure to prohibit the disclosure of prejudicial confidences where the client does not initiate the action or does not charge any wrongdoing.

LISTING OF PARTIES

There are no parties other than the petitioner, Daniel Minchew, a citizen and resident of Bethesda, Maryland; and Robert Fierer, an attorney, and a citizen and resident of Georgia.

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No. _____

Supreme Court of the United States

October Term 1986

Daniel Minchew, Petitioner

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Robert G. Fierer, Respondent

On Petition for Writ of Certiorari
to the United States Court
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Daniel Minchew, respectfully prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit referred to hereafter.

OPINIONS BELOW

The unpublished Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit, affirmed a jury verdict and judgment in favor of respondent Robert Fierer in a suit brought against his client, petitioner Daniel Minchew, arising from the alleged sums due for Fierer's alleged services in connection with potential charges against Minchew, and Minchew's participation as an immunized witness before a Senate Committee investigating then-Senator Talmadge of Georgia. Fierer was to represent Minchew in all courts at the trial or appellate level and to this Court (he pleaded guilty to one charge). The Opinion with Judgment was rendered on July 7, 1986 (Pet.App. 1-11 for Opinion, and Pet.App. 12 for

Judgment).

Thereafter, a timely petition for rehearing was filed which was denied on August 6, 1986, the order for which appears in the Appendix (Pet.App. 13-14).

JURISDICTION

The Judgment and Order of the United States Court of Appeals for the Fourth Circuit in this civil case was entered on July 7, 1986 (Pet.App. 12). A timely petition for rehearing was denied on August 6, 1986 (Pet.App. 13-14).

This Court's jurisdiction is invoked under 25 U.S.C. § 1254(1), and otherwise.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth, Seventh, and Fourteenth Amendments of the Constitution of the United States, set forth in the Appendix at Pet.App. 21-23.

The Disciplinary Rules and Ethical Considerations that are pertinent include, Disciplinary Rule 2-106, Fees for Legal Services (set forth in Pet.App. 24-26); Ethical Consideration 2-23 pertaining to it (Pet.App. 27-28); and Disciplinary Rule 4-101, Preservation of Confidences and Secrets of a Client (set forth in Pet.App. 29-32).

STATEMENT OF THE CASE

This case, as the unpublished Opinion reflects, originated in the federal courts as a diversity of citizenship action brought by an attorney, Robert J. Fierer of Atlanta, Georgia, against Daniel Minchew, a citizen of Maryland, related to an understanding they allegedly entered into on August 25, 1978 in the District of Columbia for services to be performed by Fierer as a criminal attorney on behalf of Minchew for any and all potential matters which he might require in any court or proceeding (Appendix below, App. 34-35 for "contract"), including any criminal trials and appeals.

The contract discussed in the Opinion and ruling was entered into at

least seven weeks after services began, and after Fierer had been having daily press contacts on Talmadge and Minchew, who had been his aide. Fierer was a Georgia attorney with few contacts in the Justice Department, and thus, he brought in another attorney, one Stuart Stiller. Fierer's August 1978 contract permitted up to a "cap" of $100,000 for all services in all courts, trial or appellate.

As it turned out, Mr. Minchew was made an immunized witness before the Senate Committee investigating charges against Senator Talmadge; he had other counsel present at the time with Mr. Fierer during the time of his immunized testimony as a witness, namely Mr. Stiller; and there were no trials or proceedings against him beyond a plea of guilty to a single charge. Fierer was

not involved in the pleas, which were handled by Mr. Stiller or by his office after Mr. Stiller was killed in an automobile accident.

Mr. Fierer conceded: (a) that his standard charge was about $75.00 per hour (Tr. 146-7); (b) that his alleged "contract" permitted him to be paid at the rate of $500.00 per hour (Tr. 452) once 600 hours were reached; and (c) that he could have "walked away" from his obligations to Minchew at any time (Tr. 542) in that there were no pending criminal proceedings, the matters before the Senate were in Mr. Minchew's capacity as a witness only; and evidently because there were no other civil or like proceedings in which he had to participate (Tr. 542).

Minchew had paid Fierer about $47,000, and Stiller's firm about

$34,000. The suit was for the balance of a so-called "cap" under the contract, Fierer expressly refusing to proceed quantum meruit.

A jury trial was prayed. Requests for instructions to the jury on the Code of Professional Responsibility and its binding nature, as well as instructions on the validity of the contract between the parties and its enforcement in the federal court, were made and, on the material issues here, denied.

Mr. Minchew pointed out that he was being asked to pay in effect not only the amount of the so-called "cap" with Fierer ($100,000 plus costs), but also the services of Mr. Stiller in an amount of over $34,000 (or over $134,000 plus costs) for what constituted largely no more than a plea of guilty to the

single charge involved in this cause, without a trial and without any other charges; and further, that it was obtained through the disclosure by Fierer of damaging charges, which he was hired to handle (those beyond the plea).

The legal issues in this cause relate to whether in attorney-client disputes, the extent and standards of review for the trial and appellate courts are different than in usual civil trials; and whether the trial court was correct when it said that it had no responsibility of enforcement "in regard to the Code of Professional Responsibility at all" (Tr. 118).

The pertinent facts to this Petition for Writ of Certiorari, as noted in the record are:

1. The trial court, United States District Judge Walter E. Black,

Jr., expressly ruled in the quoted portion of the record (Tr. 118, page 31, main brief):

> . . . the ruling of this Court that Mr. Genn clearly disagrees with, . . . sets a pattern in this case (sic). . . . I don't think I have any responsibility in regard to the Code of Professional Responsibility at all. Mr. Fierer in his presentation today is expressing real concern as a lawyer as to what his responsibility is, and I can't relieve him of that responsibility. You know he has had to face this throughout because, obviously the Code of Professional Responsibility frowns on this law suit, but nevertheless, we have it. . . . [emphasis added]

This was a case, therefore, in which a major issue about what duties of a trial court to enforce the Code --- and tell the jury about it --- which the trial court effectively excised from the case. That included the legal effect of threats of disclosure of the alleged

wrongs, including claims of fraud or worse, as to which Mr. Minchew consulted Mr. Fierer (Tr. 679-680; 788; 799), or about clear daily press contacts by Mr. Fierer, opposed by Mr. Minchew (Tr. 341-345), and in plain violation of the Code and the District of Columbia bar rules that applied to this case because this was a District of Columbia "contract" for services in the District of Columbia.

One critical point that was urged below related to questions of enforcement by both the trial court and an appellate court, and in particular, the significance of Ethical Consideration 2-23 of the Code of Professional Responsibility, serving as a restriction upon Disciplinary Rule 4-101(c) (Pet.App. 29-32).

In this regard, it was noted

below and again in the Petition for Rehearing that a further critical point in this cause that went well beyond the specific conflict between the parties related to (a) when an attorney may permissibly bring a legal action against his client; (b) what are the restrictions upon them in the federal courts; (c) the continuing effect of the old 1943 ABA Opinion on what confidences or prejudicial matters an attorney may disclose in a dispute with a client, which does not appear to have been reexamined since, and whether the recent Ethical Considerations significantly modify it --- especially where the client does not initiate claims of improper representation; (d) whether there is a heavy burden of presumptive overreaching in the federal courts, particularly where the alleged contract

was made long into the relation, as noted in such cases as Spilker v. Hankin, 88 U.S.App.D.C. 206, 188 F.2d 35 (D.C.Cir. 1951), and its progeny in the District of Columbia Circuit (albeit applying local law), a concept rejected by the trial court and Fourth Circuit; and (e) the extent to which a federal court, either at the trial level or on appeal must review the proceeding independently on these issues and standards that might not otherwise apply to customary civil cases.

Finally, a critical question related to the use of an impeaching instruction to the jury on Mr. Minchew's guilty plea and conviction, enabling the attorney retained to defend him, to use that very charge to impeach his testimony in the dispute between them; and whether that, or the inclusion of

severely prejudicial material (constituting about 70 hours, or less than ten percent of the alleged hours involved) is permissible.

This case raises those issues below, and the broad matters implicitly involved in their resolution.

ARGUMENT

Reasons for Allowance of the Writ

The Opinion at issue states that one primary issue raised below concerned the failure of the District Court to hold the fee agreement invalid as a matter of law "for violating disciplinary rules which proscribe excessive fees" (Opinion, page 2, Pet.App. 2). The first of the two major issues on this point was about Ethical Considera-

tion 2-23, which constituted an interpretation and definition of the so-called "disciplinary rules" --- a matter not examined in the per curiam ruling, although it was the central point of the main and underscored portions of the reply brief.

Here, one aspect of the "heart" of the argument was that the disciplinary rules are the "minimal" --- what one is punished for violating; that in this instance, their language on fee matters arose from a 1943 ABA Opinion that has been significantly restricted by Ethical Consideration 2-23; and as Petitioner noted in his main brief below, the "(n)evertheless" point in 2 Speiser, Attorneys Fees, § 18.3, 1973 Ed., pp. 462-463, has underscored how that rule has been significantly eroded in intent and purpose since 1943. That

reference reflects the point that in spite of the language of Disciplinary Rule 4-101(c), there is, or now should be (at least in the federal courts), a different standard for when these legal actions may proceed, how they shall be tried, and the standards for their independent or plenary review, which needs analytic consideration that no court has recently provided.

Here, apart from the fact that Mr. Fierer, the attorney, had a "remedy" that arguably would have more properly balanced the various interests --- quantum meruit --- Ethical Consideration 2-23, which was pressed so much below, provides the recent standard for when the suit may proceed, which was rejected below: only when "fraud" or "gross imposition" by a client occurred, or when it was "imperatively required". None

would have permitted this action.*/

Mr. Minchew stated below that the "disciplinary" rules are restricted by that "Ethical Consideration" standard (fraud or gross imposition), especially if the client does not initiate a claim of impropriety or incompetence against the attorney; and, he urged, this directly determines the standard for the independent reviewing duty of the trial court and the appellate courts in attorney-client disputes of any kind (fee or otherwise). This valid distinction between how much in confidences may be disclosed where the

*/ Furthermore, the quantum meruit alternative would have compelled consideration of the issue of how $134,000 was a fair fee for what was a plea and no trial ($100,000 for him, and $34,000 to Mr. Stiller and his firm. the latter of whom did what Fierer was to do). Compare United States v. Strawser, 581 F.Supp. 875 (C.D.Ill. 1984), that held $47,000 improper for a plea.

attorney initiates the matter, as against when he is defending his professional work or standing, was noted in a reference in Weinstein that does not seem to have been pursued in the courts. See 2 Weinstein and Berger, Federal Rules of Evidence, 1980, § 503(d)(3)(01) at p. 503-74.

Speiser observed that regardless of the right to sue for a fee, there are sharp restrictions today. As we noted from that citation, but the Opinion below would not adopt (Main Brief below, page 46):

> . . . Disciplinary Rule 4-101(c) of the Code of Professional Responsibility of the American Bar Association provides that a lawyer may reveal confidences or secrets necessary to establish or collect his fee.
>
> Nevertheless, Ethical Consideration 2-23 of the Code of Professional Responsibility of

the American Bar Association, provides: [emphasis now added]

"A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client." [emphasis added]

The Committee on Professional Ethics of the American Bar Association in one of its opinions, has said, "Ours is a learned profession, not a mere money-getting trade. . . . Suits to collect fees should be avoided. Only where the circumstances imperatively require, should resort be had to a suit to compel payment. And where a lawyer does resort to suit to enforce payment of fees which involves a disclosure, he should carefully avoid any disclosure not clearly necessary to obtaining or defending his rights." [emphasis added] (2 Speiser, Attorneys Fees, § 18.3)

Here, as noted, only 70 hours of the more than 800 hours allegedly claimed (much in press contacts)

involved the prejudicial material alluded to in the Court of Appeals decision --- less than ten percent (10%). With that the undisputed record fact, we deem it properly urged that if the Code is to be meaningfully enforced through Ethical Considerations, such as 2-23, the trial court was required to excise it from the case; and/or dismiss the suit unless what was still unpaid (Mr. Minchew paid over $46,000 to Fierer in any event, and did not seek it in a counterclaim) is deemed a "fraud" or "gross imposition" or it was "imperatively required".

This record has the critical facts within it, in spite of the seeming cursory treatment of the matter in the Fourth Circuit's Opinion, to warrant an examination of the duties of federal trial courts in these areas under

principles noted in In re Philadelphia Athletic Club, Inc., 20 B.R. 328 (E.D.Pa. 1982), citing the Third Circuit's principles in analogous circumstances that such claims are to be reviewed independently in a plenary review on appeal. To the same effect, see Financial General Bankshares, Inc. v. Metzger, 523 F.Supp. 744 (D.C.D.C. 1981), vacated on other grounds (pendent jurisdiction issues), 680 F.2d 768 (D.C.Cir. 1982).

This Opinion's approach appears in clear conflict with those circuits.

Other Points

The contract at issue in this cause is noted in the unpublished Opinion of the Fourth Circuit. It appears to refer to various trigger

points and then the claim that under the agreement, the parties "obviously contemplated" over 600 hours. It was pointed out below, however, that based upon the contract, Mr. Fierer, whose charge averaged $75.00 an hour, was able to "charge" $500.00 per hour by contract and by his own admission (Tr. 146-7, 452). This issue, then, was not about what arguably occurred (the hours expended and their necessity), but rather the conditions that existed at the time of the contract's signing in August 1978 to determine whether there is a violation of Disciplinary Rule 2-106, because of an excessive "charge" or "contract" for one (see D.R. 2-106, Pet.App. 24).

We urged that clients are in a special protected class; that the only way to be assured that the class

receives that protection is to prohibit excessive "charges" or "contracts" and not enforce them (except perhaps quantum meruit where otherwise proper), especially if signed or allegedly agreed to long after the relation began.

That public policy has been the approach in small loan cases: we look to the "charge" or "contract" at the time it was entered, not whether it works out unfairly or is made in good faith; and do so in order to protect the uninformed class. See Beneficial Finance Co. v. Administrator of Loan Laws, 260 Md. 430, 272 A.2d 649 (1971), and Credit Insurance Co. v. Able, 127 A.2d 396 (D.C.Mun.App. 1956).

The local law of the District of Columbia suggests that our proposed federal standards are clearly right on all issues. See Spilker v. Hankin, 88

U.S.App.D.C. 206, 188 F.2d 35 (D.C.Cir. 1951); Pete v. United Mine Workers, 171 U.S.App.D.C. 1, 517 F.2d 1275 (D.C.Cir. 1975); and Kiser v. Miller, 364 F.Supp. 1311 (D.D.C. 1983). See also Udall v. Littel, 125 U.S.App.D.C. 89, 366 F.2d 668 (D.C.Cir. 1966), and American v. Sheehan, 92 U.S.App.D.C. 30, 202 F.2d 213 (D.C.Cir. 1953).

Even without these standards, the use of Mr. Minchew's guilty plea to impeach him in a dispute with this attorney seems a clearly intolerable due process violation.

It remains only for this Court to address and determine whether the proper federal standards for these and like proceedings should be as proposed, which the Fourth Circuit refused to accept, and are as in the other circuits.

CONCLUSION

This case broadly affects important areas of the federal law, largely uncharted or unanalyzed for years.

The petition should be granted for the foregoing reasons.

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1569

ROBERT G. FIERER	)	
	)	Appellee,
	)	
v.	)	
	)	
DANIEL MINCHEW,	)	
	)	Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Walter E. Black, Jr., District Judge (C/A 79-2003).

Argued: April 11, 1986
Decided: July 7, 1986

Before SPROUSE and CHAPMAN, Circuit Judges, and HAYNESWORTH, Senior Circuit Judge.

Edward L. Genn for Appellant; Paula M. Junghans (Ronald B. Rubin; Garbis, Marvel & Jungans on brief) for Appellee.

PER CURIAM:

This case arises out of a fee dispute between the plaintiff Robert Fierer, an attorney, and the defendant Daniel Minchew, a former client. Minchew has appealed an adverse judgment, and raises several issues. First, whether the district court erred in failing to hold the fee agreement invalid as a matter of law for violating disciplinary rules which proscribe excessive fees. Second, whether the district court erred in admitting evidence which was prejudicial to Minchew in violation of the attorney client privilege.

I

Fierer is a criminal lawyer who practices in the State of Georgia. In July 1978, Fierer was asked by a friend to meet with Daniel Minchew, who was the

administrative aide to then United States Senator Herman Talmadge. At that time, Senator Talmadge was having some serious legal problems which eventually resulted in the conclusion of his political career. Fierer met with Minchew in Washington and they discussed the Senator's situation. Eventually their conversation came around to the fact that Minchew might have legal problems of his own arising from the investigation of Senator Talmadge. Minchew asked Fierer to represent him, and Fierer agreed. Shortly thereafter, Fierer learned that both the Senate Ethics Committee and the Department of Justice were making inquiries into alleged criminal violations within Senator Talmadge's office and that both the Committee and the Justice Department were particularly interested in Minchew.

On August 25, 1978, Fierer and Minchew entered into a formal fee agreement, which is at the heart of this action. Specifically, the agreement provided that Minchew pay a $10,000 retainer and within 120 days pay an additional $40,000. Upon the completion of 500 hours work, an additional $25,000 would become due, and upon the completion of 600 hours work, an additional $25,000 would come due, making a total fee of $100,000. From the first $50,000, $2500 was to be set aside for ordinary and necessary expenses of litigation, and a like sum was to be set aside from the second $50,000. Any costs in excess of $5,000 total were to be paid by Minchew. The agreement also contemplated the possible need for specialized assistance from outside counsel. It provided that

Fierer would pay $5,000 of the first $50,000 and $5,000 of the second $50,000 toward the legal fees of outside counsel. Any excess fees would be paid by Minchew. The representation was to extend to all matters pertaining to the investigation of Minchew's employment as administrative aide to Senator Talmadge.

From July 1978 until July 1979, the Senate Ethics Committee closely scrutinized many of the activities of Senator Talmadge. During the course of these hearings, Minchew was the chief witness. In the fall of 1978, Minchew and Fierer decided to retain counsel in Washington, D.C., to assist with the case. To this end, Fierer associated Stuart Stiller. Both Stiller and Fierer appeared at the Senate hearings as attorneys for Minchew. Minchew was granted immunity by the Senate Ethics

Committee, but he ultimately pled guilty to a violation of 18 U.S.C. § 1001 (1982), failure to provide a truthful report concerning expenditure of funds.

Minchew paid Fierer a total of $45,000 in fees and $7,000 in costs. During the course of the representation, Fierer expended enough hours to entitle him to the full $100,000 fee. When the remainder of his fee was not forthcoming, Fierer sued Minchew in the United States District Court for the District of Maryland. The jury awarded Fierer $53,983, the amount Fierer sought.

II

Minchew's argument that the fee is so excessive as to violate D.R. 2-106(a) of the Code of Professional Responsibility, which proscribes clearly excessive fees, centers around what Minchew characterizes as "trigger

points" in the fee agreement. These trigger points are the clauses in the fee agreement which govern payment of the second $50,000 of the fee, requiring $25,000 to be paid upon the completion of 500 hours work and the final $25,000 to be paid upon the completion of 600 hours work. Minchew focuses on the final $25,000, which was paid after an additional 100 hours of work, and argues that for this 100 hours Fierer is being compensated at a rate of $500 per hour, which he claims to be excessive.

Fierer testified at trial that he typically undertook criminal representations for a fixed fee, payable in advance, and that when the entire fee was not paid in advance, he would try and collect as much of it in advance as possible. It is a very common practice for criminal lawyers to handle a

representation for a fixed fee payable in advance. In the instant case, Fierer undertook the representation of Minchew for a fee of $100,000. Minchew could not pay the entire fee in advance, and the result was the fee agreement which calls for the fee to be paid in a series of four payments. Both parties obviously contemplated that the case would take in excess of 600 hours work and it did.

Minchew argues that $100,000 is unreasonable because he ultimately pleaded guilty to a violation of 18 U.S.C. § 1001, and as a result Fierer did not defend him in a criminal trial. This is the nature of a fixed fee in a criminal case. In some instances, when the defendant pleads guilty, the lawyer may be handsomely compensated, and in other cases, when there is a lengthy

trial and a difficult appeal, the lawyer may lose money.

Minchew was in serious trouble. He needed counsel to represent him not only in the event of a criminal trial, but also during the investigation of the Senate Ethics Committee and the Justice Department. The Ethics Committee investigation dragged on for more than a year. Under the circumstances we do not find a $100,000 fee to violate D.R. 2-106(a).

Minchew also charges that the district court erred in admitting evidence which was prejudicial to him as it tended to cast him in an unfavorable light. Fierer testified in great detail about the specifics of Minchew's problems during the trial of this case. The testimony included references to corruption, thievery, fraud, deceptions,

cheating, and lies, all of which were laid at Minchew's doorstep. In addition, the fact that Minchew pled guilty to a violation of 18 U.S.C. § 1001 was also admitted into evidence. Minchew objected vigorously to the introduction of this evidence as it occurred during the trial. His objections were grounded on his contention that these disclosures were barred by the attorney-client privilege or by public policy. The district court properly rejected this argument, holding that the disclosure of such information was permissible to the extent necessary to establish Fierer's right to his fee.

D.R. 4-101(c)(4) of the Code of Professional Responsibility provides that an attorney may reveal confidential information to establish or collect a fee. Even if the attorney-client

privilege were applicable to the evidence in question, Minchew would have waived his right to that privilege by challenging the reasonableness of the fee. When a client charges that a fee is unreasonable, he opens the door for his lawyer to explain exactly what services were rendered and why they were rendered. In some instances this may include revealing information which would otherwise be privileged. Although such revelations are unfortunate, there is frequently no other way that a lawyer can carry the heavy burden which is imposed upon him when he brings an action to collect a fee.

We have considered the other issues raised by the appellant and find them to be meritless. The decision of the district court is

AFFIRMED.

BEST AVA

4CCA 28
(Rev. 10/85)

United States Court of Appeals
FOR THE FOURTH CIRCUIT

July 7, 1986

TO: Edward L. Genn
Paula M. Junghans

NOTICE OF JUDGMENT

Judgment was entered in Case No. 85-1569 this date.

The Court's opinion is enclosed.

Petition for Rehearing (FRAP 40)

AILABLE COPY

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1569

ROBERT G. FIERER)
) Appellee,
v.)
)
DANIEL MINCHEW,)
) Appellant.

FILED 8/6/86

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Walter E. Black, Jr., District Judge.

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the

opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman, with the concurrence of Judge Sprouse and Judge Haynsworth.

For the Court,

John M. Greacen
Clerk

FILED AND ENTERED AUGUST 6, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBERT G. FIERER	)	
	)	
v.	)	Civil Action No.
	)	B-79-2003
DANIEL MINCHEW	)	

MEMORANDUM OPINION

This case was tried before a jury which, after its deliberations, returned a verdict in favor of the plaintiff, Robert G. Fierer, against the defendant, Daniel Minchew, in the amount of $53,983. On August 25, 1983, this Court entered judgment on the verdict. On September 6, 1983, the defendant filed a Motion for Judgment Notwithstanding the Verdict, or for New Trial, or to Set Aside Verdict or Other Relief, with a supporting Memorandum (Paper 71). The plaintiff has filed a response to defendant's motion, to which the

defendant has replied, and both parties have filed supplemental memoranda. Briefing was not completed until June 1, 1984, because of the time involved in obtaining a transcript of the jury instruction proceedings. While defendant has requested a hearing on his motion, the Court finds that no hearing is required. See Rule 6(E) of the Local Rules.

At the outset, the Court finds that this case was fully tried and argued before the jury by experienced counsel. Most of the contentions made by the defendant in his post-trial motion were previously considered and rejected by the Court. The points raised by the defendant do not require that the Court enter judgment notwithstanding the verdict, grant a new trial,

or order other relief.

In his motion, the defendant raises several points: (1) that the Court erred in allowing the case to proceed on a quantum meruit theory and in instructing the jury accordingly; (2) that a new trial is required because much of the evidence admitted was overly prejudicial; and, (3) that the Court erred in various respects in charging the jury. Each point is without merit, and defendant's pending motion will be denied.

First, contrary to the defendant's assertions, this case did not proceed on a quantum meruit theory, and the jury was not so instructed. Although there are some similar characteristics, the theories of quantum

meruit and substantial performance differ significantly. An instruction on quantum meriut [sic], which had not been pleaded, may have been improper, but instructing on substantial performance was not error. The case proceeded on a breach of contract theory. The doctrine of substantial performance permits a party to recover for breach of contract if his failure to satisfy contractual conditions were insubstantial. Going forward on a breach of contract theory, the plaintiff was entitled to an instruction on substantial performance, and the instruction given was proper under District of Columbia law.

Secondly, from a review of the trial, the Court is satisfied that the defendant's evidentiary objections are unfounded. The majority of those

objections fall under Rule 403(b) of the Federal Rules of Evidence, and they contest admissibility because unfair prejudice outweighs probative value. Each objection was fully debated at trial, and the defendant's arguments are no more persuasive now than they were then. The various evidentiary rulings are not grounds for a new trial, either in their own right, or when viewed in light of the instructions.

Thirdly, the defendant's primary ground for relief relates to various jury instructions. The defendant contends that an instruction allowing the jury to consider a defendant's criminal conviction when assessing his credibility is error, when the subject of the suit is a fee dispute. This view, which conflicts with the usual

practice in civil cases, is without support, and accordingly is rejected.

The principal ground for relief is that the instructions denied the defendant his theory of the case. Specifically, the defendant contends that by only referring to the single Fierer contract in the instructions, and making no references to the services of Stuart Stiller and to the contract for those services, the Court deprived the defendant of his defense and, in effect, directed a verdict for the plaintiff. This argument is without merit. When the instructions are read and considered as a whole, they accurately reflect applicable District of Columbia law and permitted the jury to accept either party's theory, without improperly overemphasizing any theory or any

particular piece of evidence. Had the jury been convinced by the evidence, with the help of counsel's argument, it could have accepted the theory that defendant now proffers, under the instructions given by the Court.

Notwithstanding the assertions of defendant's motion, one of the problems here concerns the form of his proposed jury instructions. Defendant's proposed instructions were, in many instances, confusing and illegible--particularly those, the omission of which he now complains. As to many, they are replete with findings of fact, or amount to a defendant's directed verdict. Consequently, the errors which defendant now asserts are largely of his own making. For instance, the defendant asserts error because

> [t]here was no way we could point to words in the instruction to be given and say to the jury as follows: "You will hear the court say in its instructions to you that if you find that Mr. Stiller's services were necessary and encompassed within the agreement, then to the extent that you find them reasonable, they shall be either a credit or they shall be deemed a part of the contract" --- or words to that defense theory.

Memorandum of Points and Authorities at 7, supporting defendant's Motion for Judgment Notwithstanding the Verdict, or for New Trial, or to Set Aside Verdict or Other Relief (Paper 71). The only such request was set out in Defendant's Proposed Instruction No. K, which is unintelligible and inappropriate. As the defendant points out, instructions are an extremely important part of the case. However, Rule 51 of the Federal Civil Rules imposes certain clear responsibilities upon the parties and the court and, in the case at bar, it is

extremely doubtful whether defendant has fulfilled his responsibilities.

Finally, the Court denies the defendant's motion, insofar as it asserts a claim for attorney's fees.

For the reasons hereinabove set forth, the defendant's pending motion will be denied by a separate Order to be entered by the Court.

Walter E. Black, Jr.
United States District Judge

Dated: April 9, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBERT G. FIERER	)	
	)	
v.	)	Civil Action No.
	)	B-79-2003
DANIEL MINCHEW	)	

ORDER

For the reasons set forth in the aforegoing Memorandum Opinion, IT IS, this 9th day of April, 1985, ORDERED as follows:

1. That the defendant's Motion for Judgment Notwithstanding the Verdict, or for New Trial, or to Set Aside Verdict or Other Relief, and including defendant's claim for attorney's fees (Paper 71) BE, and the same hereby IS, DENIED.

2. That the Clerk shall mail copies of the aforegoing Memorandum Opinion and this Order to Edward L. Genn, Esquire and Paula M. Junghans, Esquire, counsel of record for the parties to this action.

Walter E. Black, Jr.
United States District Judge

UNITED STATES CONSTITUTION

[Amendment V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION

[Amendment VII]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

UNITED STATES CONSTITUTION

[Amendment XIV]

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

DR 2-106 Fees for Legal Services.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

Ethical Consideration 2-23 of the Code of Professional Responsibility of the American Bar Association:

A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client.

The Committee on Professional Ethics of the American Bar Association in one of its opinions, has said, "Ours is a learned profession, not a mere money-getting trade. . . . Suits to collect fees should be avoided. Only where the circumstances imperatively require, should resort be had to a suit to compel payment. And where a lawyer

does resort to suit to enforce payment of fees which involves a disclosure, he should carefully avoid any disclosure not clearly necessary to obtaining or defending his rights.

A Lawyer Should Preserve the

Confidences and Secrets of a Client

* * *

DR 4-101 Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.